

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,169

ROBERT E. CARTER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

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*United States Court of Appeals
For the
District of Columbia Circuit*

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Joseph W. Stewart
CLERK

STATEMENT OF QUESTION PRESENTED

Appellant admittedly robbed a storeowner, striking him to the floor with the butt of a Luger. As appellant left the victim was reviving and when he came to ran to the door, his head bloody, and told a member of the Metropolitan Police who happened to be outside. The officer, within seconds, encountered appellant in a playground two doors from the site of the robbery and gave chase. The officer gaining, appellant turned and shot him, inflicting a fatal wound. Appellant continued his flight to the rear of his home where he entered, secreted part of the money, changed his clothes, and fled. The distance from the robbery to appellant's home was one block.

In the opinion of the appellee, the question is:

(1) Was there sufficient evidence to justify submitting to the jury a count of the indictment charging killing, regardless of purpose, in the perpetration of robbery?

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

A three-count indictment was returned against appellant (App. 107). The first count charged the purposeful, premeditated and deliberate murder of George W. Cassels, whom the evidence showed to have been a member of the Metropolitan Police (App. 14). The second count also charged first degree murder, in that appellant killed Officer Cassels in the perpetration of a robbery upon Irvin I. Kozak. The third count charged robbery. Found guilty on the second and third counts, appellant was sentenced to death (App. 107, 108).

On Saturday, July 11, 1953, Mr. Irvin I. Kozak was tending store at 1637 P Street, N. W. Mr. Kozak is the proprietor of the Gem Cleaners, located at the above address (App. 3).

A few feet east of the Gem Cleaners there is a large play-

ground, extending north almost to Q Street. The playground starts next to 1633 P Street, N. W., two doors east of the cleaning establishment, where lives Officer Joseph A. Berti, of the Metropolitan Police (App. 4, 5, 15, 16, 17, 66).

Sixteenth Street, between P and Q, is bisected by Church Street, which abuts the playground described above, and runs east to Fifteenth Street and beyond (App. 18, 21). It is but a short distance from P Street north to Church Street. This space is occupied, on the west side of Sixteenth Street, by only two buildings, one of which is the Foundry Methodist Church on the southwest corner of Sixteenth and Church Streets (App. 11, 22).

On the southeast corner of Sixteenth and Church Streets there is an apartment house, at 1515 Sixteenth (App. 18, 25). Just east of this building, on Church Street, is a garage (App. 25). Alongside this garage is a narrow areaway going south to an alley running east and west behind the fifteen hundred block of P Street (App. 18, 19, 26).

Appellant lived at 1523 P Street, N. W., in a straight line about a block east of the Gem Cleaners at 1637 P Street (App. 18, 38, 40). However, as appellant admitted on the stand (App. 65, 66), a "short cut" to the rear of 1523 P, from the cleaner's, is along the following route: east on P Street two doors, past Officer Berti's home at 1633; thence diagonally across the playground to the northeast corner, where there is a gate (App. 17, 21); then south a short distance in the alley¹ leading to Church Street (App. 21); eastward on Church Street across Sixteenth (App. 21, 22, 55, 68); past the apartment on the northeast corner of Sixteenth and Church, and the garage next to it on Church Street, to the areaway; south on the areaway to the alley paralleling P Street; to the rear of 1523 P, appellant's home (App. 56).

¹ In the rear of the buildings and playground bounding the block between P and Q, Sixteenth and Seventeenth, there is a rectangular system of alleys (App. 17, 20, 21, 58). The one last mentioned runs north and south behind the west side of Sixteenth Street and alongside the east side of the playground. It has exits at Church Street on the north and P Street on the south (App. 18, 21, 22).

About five P.M. Saturday, July 11, 1953, appellant, a stranger to the proprietor, entered the Gem Cleaners at 1637 P Street, N. W. (App. 3, 13). He asked about some dry cleaning, as a result of which Mr. Kozak went to a rack behind the counter and in the rear of the store (App. 4, 9). Hearing a noise, he turned. Appellant stuck a Luger in his stomach, saying "This is a holdup" (App. 4; Gov. Ex. 2, R. 128).

Appellant pushed Mr. Kozak into a closet and struck him on the back of the head with the pistol, felling him to the floor (App. 4, 62).

Appellant rifled the cash register of approximately one hundred and fifteen dollars (App. 5, Gov. Ex. 7, R. 128). As he was leaving, by the front door, Mr. Kozak, his head bloody, had raised to a sitting position (App. 4, 64). Mr. Kozak "came to," he estimates, in "a couple of minutes, two to four minutes" (App. 10).

Mr. Kozak ran to the front where he saw Officer George W. Cassels, of the Metropolitan Police, waiting outside 1633 P Street for his friend, Officer Berti (App. 4, 15). The store owner waved Officer Cassels over, and told him of the robbery, the latter procedure taking half a minute (App. 12, 13).

Officer Cassels called to Officer Berti, the latter coming out in about thirty seconds. At that time Officer Cassels was rounding the corner of Officer Berti's home into the playground (App. 15).

Officer Berti, following Officer Cassels to the playground, observed the appellant in the lead, both appellant and Officer Cassels "walking at a fast pace." Appellant kept looking back at the officers (App. 20).

When appellant reached the playground gate he broke into a run. Appellant ran south in the alley to Church Street. As Officer Berti reached Church Street he observed the appellant running halfway down the block with Officer Cassels visibly gaining (App. 20).

Officer Berti kept running south in the alley past Church Street to his automobile, driving the vehicle east on P

Street (App. 20-22). When he arrived at the intersection of Sixteenth and P he heard a gunshot (App. 22).

Shortly before, Mr. S. Wright was standing in front of his home at 1526 Church Street, near the corner of Sixteenth (App. 25, 26, 38). He saw appellant running along the Church Street side of the apartment (at 1515 Sixteenth Street), Officer Cassels behind him (App. 27).

When he got to the garage, appellant "twisted around" and the witness heard a shot (App. 27, 29). After the shot Officer Cassels ". . . stopped there in his tracks" and fell to the curb (App. 27).

Appellant turned and continued running down the area-way alongside the garage with something in his hand (App. 27, 29).

Two doors from the areaway, at 1525 Church Street, lives Raymond C. Johnson, a boy of ten (App. 37). He was at the back window of the second floor painting a picture of a garage in the alley behind appellant's house (App. 38).

Raymond Johnson heard a noise like a firecracker and then saw appellant running down the alley. The dog next door to the boy's house barked and appellant momentarily paused. Then he ran to his back fence and jumped over (App. 38).

By this time Officer Berti, making a right turn into Church Street from Sixteenth, discovered Officer Cassels seated at the curb at the Church Street side of the apartment on the corner (App. 22). Officer Cassels was holding his stomach and said, "I am shot" (App. 22, 23).

Officer Cassels was pronounced dead the evening of the next day, Sunday, July twelfth (App. 24, 25). The coroner found a gunshot "wound in the abdomen had injured the liver, stomach, kidney and intestine, and this wound . . . was the cause of his death . . ." (App. 2).

The slug was recovered from Officer Cassels' spine (App. 24; Gov. Ex. 1, R. 128). On the evening of Saturday, July eleventh, a nine millimeter Luger automatic pistol was recovered from appellant's home (App. 40, 47; Gov. Ex. 2, R. 128). A firearms identification expert test fired the

pistol (App. 46). A microscopic examination of the characteristic rifling marks on the test and death bullets revealed that the latter had been fired from the pistol recovered in appellant's house (App. 46, 47).

Taking the stand, appellant admitted² robbing Mr. Kozak (App. 55). He continued:

"I left there. I walked back down to 17th Street, around to the corner, up an alley. I went across the school yard. I got half way across. I seen these two fellows behind me. I started walking fast, and they started walking fast. I started running. They started running. So I ran out the school yard into Church Street, across 16th Street; on the other side of Church Street, I looked back, and there was just one. So I kept running. I heard him say something. I didn't know what he was saying. I looked back over my shoulder. He was reaching to his coat, I still running. I pulled out the gun. I turned at the same time, and I shot, and kept running."

That he had run to avoid being arrested appellant admitted, stating that he thought the men were following him because they "Probably had been down to the cleaners, and saw what happened". (App. 67).

Appellant jumped his back fence and entered his house. He put part of the money in a bank on a bureau (App. 56: Gov. Ex. 6, R. 128) He then changed his clothes, went to the street and hailed a taxicab (App. 56). He was not apprehended until early Sunday morning, July twelfth (App. 40).

STATUTE INVOLVED

31 STAT. 1321 (1901), as amended, 54 STAT. 347 (1940), 22 D. C. Code § 2401 (1951):

Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and pre-

² Appellant's testimony coincided in all essential particulars with his confession (Gov. Ex. 3, App. 48 *et seq.*). He testified he did not deny anything contained in the confession (App. 91).

meditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, as defined in section 22-401 or 22-402 of this Code, rape, mayhem, robbery, or kidnapping, or in perpetrating or in attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, is guilty of murder in the first degree.

SUMMARY OF ARGUMENT

The court did not err in submitting the second count of the indictment, charging murder in the perpetration of robbery, to the jury.

The act of robbery continues, in contemplation of law, beyond the point in time when criminal liability for the robbery is fixed. "The asportation of the goods is a necessary ingredient of the robbery. . . ." Asportation from the scene is a part of the crime, and where there is flight, continues until there is reached a place of "seeming security," where the stolen property can be secreted, and the culprit's dominion over it established.

Delay in beginning the pursuit until an alarm can be sounded and pursuit organized and instituted has been held immaterial in cases less strong than this one.

In housebreaking, a crime in which asportation is not an element, a killing within the *res gestae* of the housebreaking, or connected with it as part of one continuous transaction (such as where the killing was "done in flight from the scene of the crime to prevent detention or promote escape . . .") is a murder in the perpetration of housebreaking. This authority applies for a stronger reason to killing in the perpetration of robbery, which includes the element of asportation and therefore, unlike housebreaking, is not completed before the flight occurs.

ARGUMENT I

There Was Ample Evidence of Homicide in the Perpetration of Robbery

At the close of all the evidence the appellant moved for a judgment of acquittal on the second count of the indictment on the ground that there was insufficient evidence of killing in the perpetration of robbery in that the "robbery was completed" at the time of the killing (App. 92). Appellant argues here that the denial of his motion was error (Br. 5 *et seq.*).

Appellant concedes (Br. 6) that homicide occurring while the robber is "fleeing the scene under immediate pursuit" is committed in the perpetration of robbery. He concludes from the record, however, that the "Testimony showed that there was no immediate pursuit . . ." (Br. 4).

Relied on is the fact that appellant claimed to have taken a slightly more circuitous route than the circumstances indicated would have been the "short cut" to the rear of the home. He testified that he reached the playground, where he encountered Officer Cassels, by way of an alley opening on Seventeenth Street, instead of immediately proceeding east (App. 55). The alley on Seventeenth Street, however, is only three doors from the site of the robbery (App. 50). Also relied on is the testimony of the victim of the robbery that it took him "a couple of minutes, two to four minutes" to "come to" (App. 10).

Assuming appellant took the course he described, and that the alarm was sounded four minutes later, these circumstances are well within the limits of time and place held to constitute immediate flight, as authorities cited later amply demonstrate.

It is recalled that as soon as he could the proprietor ran to the door to the officer outside. And, as appellant testified, the robbery victim was reviving before appellant left. Mr. Kozak had been knocked to his hands and knees (App. 4). Appellant testified he knew he "didn't kill him" because Mr. Kozak was "sitting up" as he left (App. 64).

For the proposition that the murder was collateral to

the robbery, appellant cites³ Wharton, *Homicide* 184 (3d ed. 1907). However, the author goes on to say:

"Where a homicide is committed within the *res gestae* of a felony, however, it is committed in the perpetration of, or attempt to perpetrate, a felony within the meaning of such statutes . . . robbery within the meaning of a rule that a homicide committed in the perpetration of a robbery is murder in the first degree is not necessarily concluded by the removal of the goods from the presence of the owner; and it is not necessary that the homicide should be committed at the precise time and place of the robbery."

Id. at 186.

The author cites (p. 186 n. 13) *State v. Brown*, 7 Ore. 186 (1879). In that case three defendants entered a pawnshop, knocked the proprietor senseless, took watches and money from the safe, and left. A constable, having been notified, pursued them. "After running four blocks of two hundred feet each, and across two streets of sixty feet each, pursued by the constable, they were about to be overtaken." *Id.* at 195. They stopped and appellant, firing at the constable, killed a bystander. Appellant's conviction of murder in the commission of robbery was affirmed.⁴

³ In addition appellant cites *Tyler v. United States*, 90 U.S. App. D.C. 2, 193 F. 2d 24 (D.C. Cir. 1951), involving homicide in the perpetration of housebreaking, and seven cases where persons robbed were killed: *United States v. Evans*, 28 App. D.C. 264 (D.C. Cir. 1906); *Patten v. United States*, 42 App. D.C. 239 (D.C. Cir. 1914); *Marcus v. United States*, 66 App. D.C. 298, 86 F.2d 854 (D.C. Cir. 1936); *Mumforde v. United States*, 76 U.S. App. D.C. 107, 130 F. 2d 411 (D.C. Cir. 1942), *cert. denied* 317 U.S. 656 (1942); *Wheeler v. United States*, 82 U.S. App. D.C. 363, 165 F.2d 225 (D.C. Cir. 1947), *cert. denied* 328 U.S. 829 (1948); *Hall v. United States*, 83 U.S. App. D.C. 166, 168 F.2d 161 (D.C. Cir. 1948), *cert. denied* 334 U.S. 853 (1948); *Goodall v. United States*, 86 U.S. App. D.C. 148, 180 F.2d 397 (D.C. Cir. 1950), *cert. denied* 339 U.S. 987 (1950).

⁴ The Court held: "When a person takes with force or violence the goods of another from his person or presence and against his will, he has committed robbery. Or to use the more exact phrase-

In *State v. Habig*, 106 Ohio St. 151, 140 N.E. 195 (1922) conviction of murder in the perpetration of robbery was sustained under a statute⁵ substantially identical with that of the District of Columbia.

In that case the appellant and two companions held up and robbed three pedestrians. A fourth, showing resistance, was struck over the head and all three robbers ran. One of the victims ran several squares until he encountered two policemen to whom he reported. The officers ran until they caught sight of the robbers. One of the officers ran another block and across a vacant lot in order to intercept

ology of the old writers upon English criminal law, 'an act of violence constitutes robbery,' but it does not necessarily complete the crime. It constitutes robbery so far as to render the perpetrator liable to conviction for it; but the act of robbery itself may be prolonged beyond the time when that liability is fixed. When Brown and his co-defendant took the property by force from the person or presence of O'Shea, they committed the crime of robbery so far as to render themselves liable to punishment for it, but the robbery in contemplation of law was not completed until the taking and carrying away was ended. The asportation of the goods is a necessary ingredient of the robbery, as essential to complete the crime as the violence to the owner, or as the seizure itself. The act of taking and carrying away in the case of Brown and his codefendants, commenced when the seizure was made in the pawnshop of O'Shea, and continued until they had unmolested dominion over the property which they had taken. When they first acquired that control the robbery was ended, and not before.

"From the statement of facts . . . we are satisfied that the asportation was one continuous act, from the violent seizure when O'Shea was stricken down senseless, until after Louis Joseph was killed. There was no cessation in flight; no casting away or secreting the property; no division of the spoils; no disposition to relinquish control of the goods. But on the contrary, there appeared to be a concerted action to keep possession of them and to defend that possession even if it became necessary to take human life to secure it."

"This we regard as the fair construction to be put upon section 506 of the criminal code, and its application to the case of the defendant." *Id.* at 208, 209.

⁵ "Whoever . . . in perpetrating or attempting to perpetrate . . . robbery . . . kills another, is guilty of murder in the first degree". *Id.* at 197.

the robbers a block beyond this spot. When the officer attempted to halt the robbers he was fatally shot by one of them.

Habig was indicted in two counts, the first charging deliberate and premeditated murder and the second charging murder in perpetrating robbery. He was found not guilty on the first count, and guilty on the second. In view of this the Court held:

“... we must therefore inquire into the elements of the crime of robbery and apply the essential definition of that crime to the facts of this controversy. ... It will therefore be seen that the commission of the crime necessarily includes not only the violent and forcible taking but also the felonious carrying away of the proceeds of the robbery. ... It is clear that the crime of robbery is not complete without some carrying away, and the only question which can arise in this connection relates to the distance the goods must be carried, and the circumstances under which they are carried, in order to segregate the continued asportation from the crime itself. Though the crime of robbery is complete with only a slight asportation, yet, if the carrying away is in fact a long distance, the crime is still in process of commission if pursuit of the robber is immediately begun and continued without interruption until the flight has carried the perpetrator to a place of seeming security, or until uninterrupted pursuit is no longer continuously active.” *Id.* at 197.

The Court recognized that delay in beginning the pursuit did not necessarily separate the flight from the crime:

“The mere fact of delay in beginning the pursuit until an alarm can be sounded and pursuit organized and instituted does not necessarily segregate the flight and prevent it being part and parcel of the crime. As soon as the money and watch were forcibly taken from Jennings the crime was complete in the sense that a prosecution could have been predicated thereon if no

further acts had been committed, but it was not complete in the sense that the subsequent asportation of the property from the scene of the crime would not be a part of the crime. . . .

"In the case at bar, while the crime of robbery had sufficiently progressed to support a conviction against Habig for that crime, he was nevertheless still engaged in his felonious purpose, that of carrying away the proceeds of his crime, and there had been no division of the spoils, neither had the conspirators reached a place of seeming security, nor had their continuous flight come to an end. The alarm was so quickly sounded, the pursuit so immediately begun, and so continuously pursued to the point where the homicide was committed, that the conclusion must be reached that the homicide was committed by Habig while perpetrating the robbery, and as a part of the *res gestae*." *Id.* at 198, 199.

The Court noted conflicts in the evidence relating to the nature of the flight, the time it consumed, and the length of the course. The defense estimated the time elapsing between the robbery and murder to be fifteen minutes, as against five for the government. Appellant claimed that he walked slowly three squares and ran two more, while the government claimed the course was shorter. These differences the Court characterized as unimportant.

The above cases illustrate application of the statute where details of time and distance of flight are less conclusive than those in the case at bar. Other examples are: *Commonwealth v. Darcy*,⁶ 362 Pa. 259, 66 A.2d 663 (1949); *Commonwealth v. Hough*, 358 Pa. 247, 56 A.2d 84 (1948); *State v. McCarthy*,⁷ 160 Ore. 196, 83 P.2d 801 (1938); *State*

⁶ Death resulting from shooting by robber to "ward off pursuit" is murder in the perpetration of robbery. *Id.* at 674.

⁷ "So long as the defendant was in flight and seeking to find a place in which the stolen property could be secreted, his dominion over the property was not unmolested and the robbery had not ended." *Id.* at 803.

v. *Messino*, 325 Mo. 743, 30 S.W.2d 750 (1930); *State v. Gimbel*,⁸ 107 N.J.L. 235, 151 Atl. 756 (1930); *People v. Dowell*, 204 Cal. 109, 266 Pac. 807 (1928); *Commonwealth v. Doris*, 287 Pa. 547, 135 Atl. 313 (1926).

In *State v. Habig, supra*, the Court noted that it had been held that after a housebreaker had left the premises and was in flight a killing by him was considered as committed in the perpetration of housebreaking. The Court pointed out that this authority applied for a stronger reason to murder in the perpetration of robbery, inasmuch as the crime of robbery, unlike burglary, includes the "element of asportation for a shorter or a longer distance" and therefore is not completed before the flight occurs. *Id.* at 198.

Illustrative of cases holding murder in the course of a burglar's flight to have been committed in the perpetration of burglary are: *Commonwealth v. Tauza*, 300 Pa. 375, 150 Atl. 649 (1930); *State v. Adams*,⁹ 339 Mo. 926, 98 S.W.2d

⁸ This defendant, after robbing the manager of a grocery, "walked down certain streets and thinking that he had been seen, started to run. He ran through several streets and lots and during his flight was pursued by Paul Bohrer (deceased), Edward Maurer, the manager of the store, and several other persons." *Id.* at 758. Gimbel fired, killing one of his pursuers. The Court, in its syllabus, held: "When, incident to a robbery, the robber kills a third party who is endeavoring to check his flight and apprehend him, the killing is so closely connected with the robbery as to be a part of the *res gestae* thereof, which may be an emanation of the act of robbery, and although committed after the fact thereof, is still committed in the perpetration of the robbery within the meaning of the statute, and is murder of the first degree." *Id.* at 757.

⁹ "If the foregoing view be correct, that asportation does not prolong the crime of burglary beyond the felonious breaking and entering, instruction No. 8 in this case was wrong. But we think it is unnecessary to decide that point, because the great weight of authority takes a broader view of the whole question. It is held in many jurisdictions, including Missouri, that when the homicide is within the *res gestae* of the initial crime and is an emanation thereof, it is committed in the perpetration of that crime in the statutory sense. Thus it has been often ruled that the statute applies where the initial crime and the homicide were parts of one continuous

632 (1936); *Commonwealth v. Carey*, 368 Pa. 157, 82 A.2d 240 (1951).

It is therefore concluded that the homicide herein was in the perpetration of robbery, because asportation had not ceased, the slaying was within the *res gestae* of the robbery, and both the robbery and the homicide constituted parts of one continuous transaction.

CONCLUSION

The jury's verdict was based on clear evidence that appellant wantonly shot and killed a police officer while the latter was engaged in the faithful performance of his duty. As no error prejudicial to appellant is revealed by the record, it is respectfully submitted that the judgment below should be affirmed.

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transaction, and were closely connected in point of time, place and causal relation, as where the killing was done in flight from the scene of the crime to prevent detection or promote escape. The same rule has been followed in cases of attempted robbery where there was no asportation, the robbers being compelled to flee without obtaining any property . . . this is the prevailing doctrine in this country . . ." *Id.* at 637.